IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

OP.No. 16165 of 1999(Y)

PETITIONER:

G.SREEKANTAN, DEVAKI NIVAS,
MARKET ROAD, ATTINGAL.

BY ADV. SRI.T.K.ANANDA PADMANABHAN
SRI.M.S.ROY

RESPONDENTS:

----

1. **CHIEF COMMISSIONER OF INCOME TAX**
   CENTRAL REVENUE BUILDINGS, IS PRESS ROAD,
   ERNAKULAM 18.

2. **COMMISSIONER OF INCOME TAX,**
   AYAKAR BHAVAN,
   KAUDIAR, TRIVANDRUM.

3. **ASSISTANT COMMISSIONER, INCOME**
   TAX CIRCCE – 1 TRIVANDRUM.

4. **TAX RECOVERY OFFICER,**
   USHUS COMPLEX, VADAYATTUKOTTA, KOLLAM.

BY ADV. SRI.P.K.R.MENON(SR.),SC FOR IT
SRI.GEORGE K. GEORGE

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER OPN CMP. NO.26313/1999 IN OP. NO.16165/1999

DISMISSED

9.1.2007 **SD/- S.SIRI JAGAN, JUDGE**

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DT.10.11.1998.

EXT.P2:- COPY OF THE PETITION DT.27.7.89 FILED UNDER SEC 273 (A) BEFORE THE 2ND RESPONDENT.

EXT.P3:- COPY OF THE ORDER OF THE 2ND RESPONDENT DT. 16.2.1996.

EXT.P4:- COPY OF THE PETITION DT.2.7.96 FILED UNDER SEC 220 (2A) BEFORE THE 2ND RESPONDENT.

EXT.P5:- COPY OF THE ORDER DT.18.9.96 OF THE 2ND RESPONDENT.

EXT.P6:- COPY OF THE STATEMENT SHOWING THE TAXES ALREADY PAID BY THE PETITIONER.

EXT.P7:- COPY OF THE PETITION DT.2.12.96 BEFORE THE 1ST RESPONDENT.

EXT.P8:- COPY OF THE ORDER DT.31.3.99 OF THE 1ST RESPONDENT.

EXT.P9:- COPY OF THE CERTIFICATE ISSUED BY THE TAHSILDAR, CHIRAYINKEEZHU.

EXT.P10:- COPY OF THE COMMUNICATION DT. 23.8.96 OF THE 4TH RESPONDENT TO THE 2ND RESPONDENT.

/TRUE COPY/

tss

S. SIRI JAGAN, J.

O.P. No. 16165 OF 1999 Y

Dated this the 9th day of January, 2007

J U D G M E N T

The petitioner is an assessee under the Income Tax Act. For various assessment years, penalty was imposed on the petitioner on the ground that he has not disclosed his true income. Against the same, the petitioner filed petition under section 273A for waiver of penalty. The Commissioner of Income Tax passed orders under section 273A on 16.2.1996 by which the penalty under section 271(1)(a) was fully waived for assessment years 1978-79 to 1980-81. The interest and penalty for assessment years 1981-82 to 1986-87 were not waived since there was huge difference between the income returned and assessed which according to the Commissioner of Income Tax showed that the petitioner had not made a full and true disclosure of particulars of his income and hence the conditions for waiver under section 273A was not satisfied. Accepting that order, the petitioner filed Ext.P4 for waiver of interest on the penalty. That application was dismissed by Ext.P5 order holding that the petitioner has not proved that the payment of interest under section 220(2) will cause genuine hardship to the assessee. The said order is under challenge in this original petition. The petitioner's contention is that the finding of the Commissioner of Income Tax that payment of interest under section 220(2) would not cause genuine hardship to the petitioner is patently without any basis and

unsustainable. He would argue with the help of Exts.P9 and P10 that the payment of interest would cause genuine hardship to him. The Department has filed a statement controverting the contentions of the petitioner stating that circumstances revealed that the payment of interest would not cause any genuine hardship to the petitioner.

2. I have considered the rival contentions in detail.

3. It is not disputed by the Department that the income for which tax was demanded was earned by the petitioner from his business of running toddy and arrack shops. It is admitted that the petitioner is no longer conducting the said business. The petitioner contends that for paying of the tax and penalty which amounted to Rs.17,75,893/- the petitioner had to sell one of his residential house and he is now left with only 4 cents of land and a house thereon. The petitioner would point out that even as per Ext.P5, the agricultural income and other income would come to only about Rs.70,000/- per annum even assuming that the same is true. He had to sell properties to find the money for paying all the arrears of tax and penalty. Now the interest demanded under section 220(2) comes to Rs.8,77,295/-. In Ext.P9 certificate issued by the Tahsildar, Chirayinkeezhu, it is certified that the petitioner is in possession of 2.93 ares of dry land. Further, in paragraph 4.1 of P10, which is the communication from the Tax Recovery Officer, Kollam to the Commissioner of Income Tax, Trivandrum, it is specifically stated as under:

> " The present petition is for waiver of the aforesaid interest u/s.220(2). The defaulter had discontinued his business since 1989 and is not doing some petty services. The defaulter has paid the dues by disposing of some of his properties as a result of great pursuation from the department. He has already utilised all possible efforts to clear off the dues. Thus, the payment of Rs.8,77,295/- u/s.220(2) may cause to him genuine hardship."

As such, it appears that the Commissioner of Income Tax has not, while passing Ext.P5 order taken into account materials available with him to decide the issue. He has not even referred to the materials disclosed in Exts.P9 and Ext.P10. As such, I am satisfied that Ext.P5 suffers from the vice of non-application of mind to the relevant facts of the case. Accordingly, I quash Ext.P5 and direct the second respondent to re-consider Ext.P4 application submitted by the petitioner in the light of Exts.P9 and P10 and pass fresh orders in accordance with law. This shall be done within a period of two months from the date of receipt of a copy of this judgment.

The original petition is disposed of as above.

(S. SIRI JAGAN, JUDGE)

aks

S. SIRI JAGAN , J.

OP No.16165/99Y

J U D G M E N T

9th January, 2007